

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT, IN AND
FOR UTAH COUNTY, STATE OF UTAH

Q-3

PROVO RESERVOIR COMPANY,
a corporation,

Plaintiff,

vs.

PROVO CITY, et al,

Defendants.

AMENDMENT TO ANSWER.

Comes now defendant, Utah Power & Light Company, a corporation, and by leave of court first had and obtained, amends its answer, hereinbefore filed, in so far as such amendment is appropriate to meet the amendment to the complaint made by plaintiff, pursuant to order of court made and entered on, to-wit: September 10, 1918, by inserting in this defendant's answer, hereinbefore filed, on page 1 thereof, a new paragraph, numbered III, such paragraph to read as follows:

III.

1. In answer to paragraph 29a of the plaintiff's complaint, as amended by amendment filed September 10, 1918, this defendant denies that the normal flow from Provo River during the low water period of each year, in the irrigation season, is not less than substantially 305 cubic feet per second, and denies that the normal low water flow is, or has been at any time, greater than 200 cubic feet per second. This defendant further denies that the plaintiff is the owner, either by acquisition, by purchase from prior appropriators, or otherwise, or at all, of the right to use 46 cubic feet per second, or any other quantity, of the flowing waters of Provo River during its normal flow, and denies that any said right is a primary right. Denies that the plaintiff has the right to any such, or any, quantity of the normal flow of Provo River.

In this connection this defendant says that it has no knowledge, information or belief, sufficient to enable it to answer any of the other allegations of paragraph 29a of the complaint, as amended, and therefore, and on that ground, it denies each and every allegation thereof.

2. Further answering, and by way of separate defense to the allegations of the complaint, and particularly of paragraph 29a thereof, as amended as hereinbefore recited, this defendant alleges that the allegation of said paragraph 29a that the plaintiff is the owner, among other rights, of "46 cubic feet per second of the flowing waters of said river during its normal flow; which said right is a primary right," is based, so this defendant is informed and believes, and as is alleged in the plaintiff's original complaint on file herein, on what is known as the "Blue Cliff Canal right," which as likewise stated in such original complaint, is a secondary or Class B right. That in a suit lately pending, and decided in this court, wherein Provo City, et al, were plaintiffs, and the Telluride Power & Transmission Company, et al, were defendants, which suit was numbered and docketed as No. 957, the predecessors in interest of the plaintiff herein, the Provo Reservoir Company, to-wit: The Blue Cliff Canal Company, and of this defendant herein, to-wit: The Telluride Power Company, and The Telluride Power & Transmission Company, were parties; that the purpose of said suit was to adjudicate the waters of Provo River, and particularly rights to the waters of said river claimed by the parties thereto, including the predecessors in interest of the plaintiff herein, and of this defendant. That by judgment or decree duly and regularly made and entered by said court, in said suit, on or about January 26, 1907, it was, among other things, ordered, adjudged and decreed as follows: to-wit:

"(III)

"a. That the plaintiffs, together with John E. Booth and the West Union Canal Company are the owners and entitled to the use of 17,000 minute feet of Class "A" waters measured at the mouth of Provo Canyon, except, however, the Blue Cliff Canal Company is the owner and entitled to the use of two cubic feet thereof per second of time from 6 o'clock p. m. every Saturday until 6 o'clock a. m. the succeeding Monday, and from 6 o'clock p. m. until 6 o'clock a. m. each day thereafter."

* * * * *

(IV)

"The foregoing constitutes the whole of the waters of the said river within Class "A" measured at the points aforesaid, and is determined to be the flow of the said river when the waters are normal, and when what is called 'high water' has ceased to flow. When the waters of the said river, measured as aforesaid, are insufficient to supply the class 'A' rights in full, then the waters of the said river shall be divided among the owners of class 'A' water rights in the ratio that each owner's right stands to the whole rights of the said class. The foregoing rights are subject to the rights of the Telluride Power Company hereinafter decreed and determined."

* * * * *

(VI)

"Subject to the rights of the Telluride Power Company as hereinafter decreed, George I. Taylor is the owner and entitled to the use of 8 minute feet of the waters of class 'B', Charles S. Conrad is the owner and entitled to the use of 24 minute feet thereof, the South Fork Cattle Company is the owner and entitled to the use of 18 minute feet thereof, and the rest and residue of the waters of the said river designated class 'B' is owned by, and the following parties are entitled to its use, to-wit:

* * * * *

"b. The Blue Cliff Canal Company is the owner and entitled to the use of nine hundred and sixty seventeen-thousand-nine-hundred-and-sixtieths (960-17,960) thereof.

"The waters and water rights herein designated and known as class 'B' are inferior and subsequent to and shall not be available until all the rights of class 'A' are satisfied."

(VII)

* * * * *

"The Telluride Power Company is the successor in interest and has acquired all the water rights, real and personal property heretofore possessed by the Telluride Power Transmission Company in the State of Utah and is now the owner of the dam built across Provo River in Section 34, Township 5 South, Range 3 East, S.L.M., and of the flume and pipe line extending from the said dam to its power generating station on the northwest quarter of Section 7, Township 6 South, Range 3 East, S.L.M., at the mouth of Provo Canyon in Utah County, Utah.

"The Telluride Power Company has appropriated and has the right to divert all waters flowing to said dam and all of the waters flowing in Provo River below said dam and above the bridge crossing the said river near the mouth of Bridal Veil Falls, and all the waters of those certain springs arising in Section 33, Township 5 South, Range 3 East, S.L.M., known as Johnson or Lower Guard Quarter Springs, and all the waters of those certain streams in said canyon known as Lost Creek, Guards Quarter Creek, South Fork, Upper Falls, and Bridal Veil Falls, and has the right to conduct all the said waters to said power generating station and there to utilize all the said waters for power purposes only; provided, however, that it has the right to use at such places as it may elect for irrigation and other beneficial purposes all the waters of the said Johnson Springs."

That said judgment has never been appealed from, reversed or modified, and ever since its entry has been, and still is, in full force and effect. That by said judgment the status of the said Blue Cliff right was determined and adjudged to be secondary and subordinate to the right of this defendant's predecessor in interest, and the plaintiff, as successor in interest of said Blue Cliff Canal Company is estopped by the record of said proceedings, and by said judgment, to assert against this defendant that said Blue Cliff Canal right is a primary right, or that this plaintiff is entitled to 46 second feet, or any other quantity, of the normal flow of the waters of Provo River, as a primary right.

3. For a second affirmative defense to the said complaint as amended, and particularly to the rights claimed in said paragraph 29a, as amended, this defendant repeats and re-alleges, and makes part of its separate defense, the allegations of the preceding paragraph 2 of this amendment to answer, and in addition thereto alleges:

That from the date of rendering said judgment and decree in said case, numbered 957, to-wit: January 26, 1907, until and including the irrigation season of the year 1917, a watermaster, or several successive watermasters, were engaged in distributing the waters of Provo River; that said watermasters were operating under decrees of court, and as to the parties to this cause, and particularly to this plaintiff, the Provo Reservoir Company, and its predecessors, and this defendant, Utah Power & Light Company, and its predecessors, the said watermasters were administering the waters of said river in accordance with the said decree as hereinbefore alleged; that with the consent and acquiescence of the plaintiff herein, and its predecessor, the said watermaster, or watermasters, during each and every year from 1907 to 1917 inclusive, as aforesaid, distributed to this defendant, the Utah Power & Light Company, the waters of Provo River to which it was, and should be, entitled under said decree, and delivered to the plaintiff, and its predecessors, none of said waters included within said so called Blue Cliff right alleged and claimed for 46 second feet, or any other waters equivalent thereto, or in lieu thereof, as

a primary right, but distributed said waters to the said plaintiff, and its predecessors, if at all, only during flood season, and as a secondary right, and such distribution of said waters was acquiesced in at all times by the said plaintiff, and its predecessors, and was never complained of, and the plaintiff, by its complaint filed herein in this cause, on or about the _____ day of February, 1914, alleged as follows:

"29 (d). That the plaintiff has further acquired by purchase, and is the owner and entitled to the use of secondary or 'Class B' water right in said Provo River, as follows:

"'The Blue Cliff Canal Right' consisting of nine hundred and sixty, seventeen-thousand-nine-hundred and sixtieths, of what is known as 'Class B' water right as set forth and defined in that certain civil action No. 957 tried in the District Court of the Fourth Judicial District, Utah County, State of Utah, wherein Provo City, et al, were the plaintiffs and The Telluride Power and Transmission Company, et al., were the defendants, the same being the flow of said Provo River measured near the mouth of Provo Canyon in excess of 17,517 cubic feet of water per minute."

And all statements of counsel and admissions during the trial stated at all times that it claimed such so-called Blue Cliff right as a secondary or Class B right, and not as a primary right, and has never insisted nor claimed, (until this amendment was tendered for filing under the tentative decision of the court rendered herein, awarding the plaintiff the said Blue Cliff Canal right as a primary or Class A right) that said right was ever other than a secondary or Class B right; that this defendant, and its predecessors in interest have at all times since the entry of said decree in January, 1907, relied upon said decree, and upon the plaintiff's, Provo Reservoir Company's, acquiescence therein, and has never sought to obtain, or to preserve any evidence as to the character or quantity of the Blue Cliff Canal Company's right; that by said conduct, and acquiescence in said decree, the said plaintiff is estopped to claim 46 second feet, or any other quantity, of the normal flow of the waters of Provo River as a primary right.

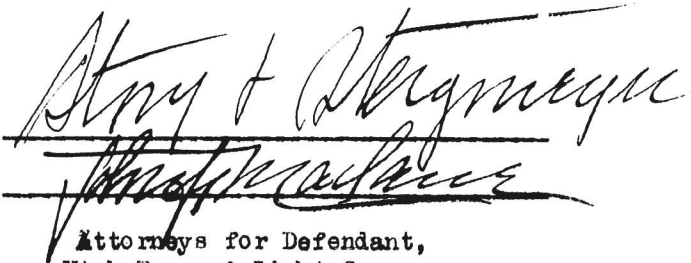
4. Defendant, by way of further answer, and separate affirmative defense, re-alleges, and makes part of this paragraph and separate defense to the amended complaint, and particularly to said paragraph 29a as amended, the allegations of the two preceding paragraphs of this amendment to answer,

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and further alleges as part of its separate defense that this defendant has, under said decree of court, and distribution of water by the watermaster, claimed as of right and used the waters of Provo River at all times in contravention of, and hostility to, the rights, if any, of the Blue Cliff Canal Company, and its successors, except as a secondary or Class B right, and has adversely claimed and possessed said rights, if any, for a period of ten years, without protest, claim or demand on the part of said Blue Cliff Canal Company, or its successors in interest, particularly of this plaintiff. That in consequence thereof this defendant, and its predecessor in interest, have acquired, through adverse possession and adverse user, title to the waters claimed herein, by this amendment to the complaint, by the plaintiff.

5. Defendant, by way of further answer and separate affirmative defense to the amended complaint, and particularly to said paragraph 29a as amended, alleges that if the plaintiff, or its predecessors in interest, and particularly the Blue Cliff Canal Company, ever acquired a right to 46 second feet, or any other quantity of the normal flow of the waters of Provo River, as a primary or Class A right, or as any other right, the said plaintiff and its predecessors in interest have abandoned and/or ceased to use such water for a period of seven years, and for more than seven years; that any such right ever possessed by said plaintiff, and its predecessors in interest, and particularly the Blue Cliff Canal Company (if any, which this defendant denies) has been lost by said abandonment.

WHEREFORE, this defendant prays, as in its original answer, counterclaim and cross complaint.


Attorneys for Defendant,
Utah Power & Light Company.

STATE OF UTAH)
) SS:
COUNTY OF SALT LAKE)

Markham Cheever, being first duly sworn, says that he is an officer of the defendant, Utah Power & Light Company, a corporation, to-wit: the General Superintendent thereof, and that he is acquainted with the facts set forth in the foregoing amendment to answer, counter-claim and cross-complaint, and knows the contents thereof, and that the same is true of his own knowledge except as to matters therein stated on information and belief, and that as to those matters he verily believes it to be true; and that as such officer he makes this verification for and in behalf of the defendant above named.

Markham Cheever

Subscribed and sworn to before me this 21st day of September,

A. D. 1918.

Bismarck Snyder

Notary Public.



Service of foregoing Amendment to Answer, by receipt of
copy thereof, acknowledged September 23, 1918.

~~Wedgehead, Quincy & Shaw~~
~~Evans, Holland & Evans~~

per. B.B.
Attorneys for Provo Reservoir
Company.

NO. 2888

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COUNTY, STATE OF UTAH.

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Defendants.

AMENDMENT TO ANSWER

FILED

Sept 24, 1918

IN DIST COURT
UTAH COUNTY CLERK
* FILED *
SEP 23 1918
J. J. Esperson
Leah Smart